

The Honorable Marsha J. Pechman

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON AT SEATTLE

BOILERMAKERS NATIONAL ANNUITY
TRUST FUND, on behalf of itself and all
others similarly situated,

Plaintiff,

v.

WAMU MORTGAGE PASS THROUGH
CERTIFICATES, SERIES AR1, *et al.*,

Defendants.

Case No. C09-00037MJP

**THE RATING AGENCIES' JOINT
MOTION TO DISMISS THE SECOND
AMENDED CONSOLIDATED CLASS
ACTION COMPLAINT**

**NOTE ON MOTION CALENDAR:
May 28, 2010**

ORAL ARGUMENT REQUESTED

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RELIEF REQUESTED AND SUMMARY OF ARGUMENT

Defendants The McGraw-Hill Companies, Inc. ("McGraw-Hill")¹ and Moody's Investors Service, Inc. ("Moody's" and collectively, the "Rating Agencies") respectfully move to dismiss the claims asserted against them in the Second Amended Consolidated Class Action Complaint (the "Second Amended Complaint" or the "SAC") pursuant to Fed. R. Civ. P. 8 and 12(b)(6).

The SAC represents Lead Plaintiffs' third attempt to advance a theory of liability against the Rating Agencies in connection with certain mortgage-backed securities allegedly purchased by Plaintiffs. Initially, with their first Consolidated Class Action Complaint filed on November 23, 2009 and their Amended Consolidated Class Action Complaint filed on December 31, 2009, Plaintiffs sought to impose liability against the Rating Agencies under § 11 of the Securities Act of 1933 (the "1933 Act"), asserting that the Rating Agencies were "underwriters" of the securities they rated. To date, that exact theory has been rejected across the country in *six cases*, which have dismissed § 11 claims virtually identical to those asserted in Plaintiffs' earlier complaints.² Plaintiffs have since dropped that theory. *Four* of those cases, however, also involved claims seeking to hold the Rating Agencies liable under § 15 of the 1933 Act as "controlling persons," the claim Plaintiffs now advance for the first time against the Rating Agencies in the SAC. That theory too has been rejected by *every* court that has considered it and should be rejected

¹ Because the allegations in the Second Amended Complaint regarding McGraw-Hill concern its business unit, Standard & Poor's Ratings Services, we refer to this defendant herein as "S&P."

² See *In re Wells Fargo Mortgage-Backed Certificates Litigation*, No. 09-cv-1376, Dkt. No. 198 (N.D. Cal. Apr. 22, 2010) (Illston, J.) (attached to the Declaration of Floyd Abrams ("Abrams Decl.") submitted herewith, Ex. B); *In re Lehman Bros. Securities and ERISA Litigation*, 2010 WL 337997 (S.D.N.Y. Feb. 1, 2010) (Kaplan, J.); *New Jersey Carpenters Vacation Fund v. Royal Bank of Scotland Group, PLC*, 2010 WL 1172694 (S.D.N.Y. Mar. 26, 2009) (Baer, J.); *Tsereteli v. Residential Asset Securitization Trust 2006-A8*, No. 08 Civ. 10637-LAK, Dkt. No. 52 (S.D.N.Y. Feb. 5, 2010) (Kaplan, J.) (Abrams Decl., Ex. E); *In re IndyMac Mortgage-Backed Securities Litigation*, No. 09-cv-04583, Dkt. No. 195 (S.D.N.Y. Feb. 5, 2010) (Kaplan, J.) (Abrams Decl., Ex. C); *Iron Workers Local No. 25 Pension Fund v. Credit-Based Asset Servicing & Securitization LLC*, No. 08-cv-10841, Dkt. No. 101 (S.D.N.Y. Mar. 31, 2010) (Rakoff, J.) (Abrams Decl., Ex. D).

1 here. *See, e.g., In re Wells Fargo*, No. 09-cv-1376, slip op. at 12-14 (Abrams Decl., Ex.
2 B); *In re Lehman Bros.*, 2010 WL 337997, at *4-*5; *Royal Bank of Scotland Group*, 2010
3 WL 1172694, at *7; *In re IndyMac*, No. 09-cv-04583, slip op. at 1 (Abrams Decl., Ex. C).

4 Putting aside the fact that, in the long history of the 1933 Act, no rating agency has
5 ever been deemed a “controlling person” under § 15, Plaintiffs’ claims of “control” here
6 must be dismissed for two primary reasons. First, Plaintiffs have not (and cannot) plead, as
7 they must, an underlying primary violation by the allegedly “controlled” entities, *i.e.*, the
8 non-party issuing trusts that issued the securities (the “Issuing Trusts”). *See* Section I.A,
9 *infra*.

10 Second, even if Plaintiffs had pled an underlying violation, Plaintiffs do not (and
11 cannot) set forth legally sufficient allegations of “control” against the Rating Agencies.
12 Plaintiffs’ theory is that the Rating Agencies “controlled” the Issuing Trusts by providing
13 credit ratings for the securities and “determin[ing] the structure and credit support of each
14 of the Issuing Trusts which purportedly justified the ratings.” (SAC ¶ 11). But this is the
15 very contention that was rejected in each of the four recent cases cited above and, just like
16 the plaintiffs in each of those cases, Plaintiffs here are entirely unable to allege any facts
17 constituting “control.” Moreover, any notion that the Rating Agencies “controlled” anyone
18 is contradicted throughout the SAC as Plaintiffs repeatedly allege that it was “WaMu”
19 (described in the SAC as “Washington Mutual, Inc. and its subsidiaries and affiliates”) that
20 was the driving and controlling force behind every aspect of the mortgage origination,
21 securitization and sales process here. *See* Section I.B, *infra*.

22 Plaintiffs’ § 15 claims against the Rating Agencies should also be dismissed for the
23 wholly independent reason that they are time-barred. *See* Section II, *infra*.³

24
25 ³ The Rating Agencies also join in the brief filed by the WaMu Defendants, which further
26 demonstrates that Plaintiffs have not properly pled an underlying violation of the 1933 Act by the
Issuing Trusts.

1 In sum, in addition to the numerous complaints filed by the Plaintiffs in this
2 consolidated action which opted not to include *any* claims against the Rating Agencies,
3 Plaintiffs have now attempted three times to plead a viable claim against the Rating
4 Agencies. As the SAC makes clear, they have not done so, because they *cannot* do so.
5 Accordingly, Plaintiffs' claims against the Rating Agencies should be dismissed with
6 prejudice.

7 **BACKGROUND**

8 In August 2008, this purported class action was initiated on behalf of a putative
9 class of purchasers of certain mortgage pass-through certificates (the "Certificates"),
10 commonly referred to as residential mortgage-backed securities ("RMBS"), issued pursuant
11 to allegedly false and misleading Registration Statements, Prospectuses and Prospectus
12 Supplements (collectively, the "Offering Documents"). "In a mortgage securitization,"
13 such as those at issue here, "mortgage loans are acquired, pooled together, and then sold to
14 a common law trust which in turn issues certificates to purchasers[.]" *In re Lehman Bros.*,
15 2010 WL 337997, at *1. By virtue of their purchase, investors become "beneficiaries of
16 the trust" and "receive distributions from the trustee according to the cash flow generated
17 by the pool of mortgages and the rights of the respective classes of certificate holders." *See*
18 *id.*

19 Over a year after the filing of the initial complaint, the first Consolidated Class
20 Action Complaint was filed on November 23, 2009, naming the Rating Agencies for the
21 first time. The Rating Agencies are credit rating agencies registered with the United States
22 Securities and Exchange Commission (the "SEC") as Nationally Recognized Statistical
23 Rating Agencies ("NRSROs"). (SAC ¶ 4). Credit ratings are forward-looking opinions
24 about the creditworthiness of a rated security, *i.e.*, the likelihood that a security will pay
25 interest and principal in accordance with its terms. The Offering Documents made clear
26

1 the nature and the limitations of credit ratings. For example, the Offering Documents
2 disclosed that:

3 A security rating is not a recommendation to buy, sell or hold
4 securities and may be subject to revision or withdrawal at
5 any time by the assigning rating agency. . . . The ratings on
6 the offered certificates address the likelihood of the receipt
7 by certificateholders of all distributions with respect to the
8 underlying mortgage loans to which they are entitled.

9 WaMu Mortgage Pass-Through Certificates, Series 2006-AR18, Prospectus Supplement at
10 S-81 (dated Dec. 18, 2006) (Abrams Decl., Ex. F).⁴

11 In their two earlier complaints, Plaintiffs asserted that the Rating Agencies were
12 liable as “underwriters” under § 11 of the 1933 Act. On January 29, 2010, the Rating
13 Agencies filed a motion to dismiss these claims. (Dkt. 146). After this matter was
14 consolidated with *Doral Bank Puerto Rico v. Washington Mutual Acceptance Corp.*, Case
15 No. 09-1557, Plaintiffs were granted permission to file the SAC.

16 The SAC names as Defendants: WMB, the “sponsor” and “seller” for the
17 Certificates and servicer of the underlying mortgage loans (SAC ¶ 23); WMAAC, the
18 “depositor,” a wholly-owned subsidiary of WMB and the entity that filed the Registration
19 Statements and Prospectus Supplements (*id.* ¶¶ 24-25); WCC, the “underwriter” of the
20 offerings (*id.* ¶¶ 37-38); the individuals that signed the registration statements (*id.* ¶¶ 27-
21 34); and the Rating Agencies (*id.* ¶¶ 42-43). In the SAC, Plaintiffs have dropped their
22 claims against the Rating Agencies under § 11, and instead assert only new § 15 claims.
23 Specifically, the SAC asserts that the Rating Agencies “controlled” the Issuing Trusts –
24 entities that are absent from the list of defendants in this action. Plaintiffs do not allege
25 that the Rating Agencies “controlled” Defendants WMAAC, WCC or any other entity.

26 ⁴ This Court may properly consider the Offering Documents on which Plaintiffs exclusively base
their claims. *See United States v. Ritchie*, 342 F.3d 903, 908-09 (9th Cir. 2003) (courts
determining whether a plaintiff has stated a claim may consider documents referenced extensively
in the complaint, documents that form the basis of the claim, and matters of judicial notice).
Accord Knievel v. ESPN, 393 F.3d 1068, 1076 (9th Cir. 2005).

1 Plaintiffs allege that the “Issuing Trusts were shell entities created solely for the
 2 purpose of issuing the Certificates.” (SAC ¶ 216). The Trusts were formed by trust
 3 agreements between WMAAC and the trustee. *See, e.g.,* WaMu Mortgage Pass-Through
 4 Certificates, Series 2006-AR18, Prospectus Supplement at S-25, S-26 (dated Dec. 18,
 5 2006) (Abrams Decl., Ex. F) (“The issuer of the certificates, the WaMu Mortgage Pass-
 6 Through Certificates Series 2006-AR18 Trust (the ‘Trust’), will be a statutory trust formed
 7 under the laws of the State of Delaware *pursuant to a trust agreement between WaMu*
 8 *Asset Acceptance Corp., as depositor, and Christiana Bank & Trust Company Delaware,*
 9 *as Delaware trustee.*”) (emphasis added). Subsequent agreements, the “pooling and
 10 servicing agreement[s],” between WMB and the trustee restated the trust agreements and
 11 now serve as the “governing instrument[s] of the Trust[s].” *See, e.g., id.* (“The pooling and
 12 servicing agreement . . . *among the depositor, Washington Mutual Bank, as servicer, the*
 13 *Delaware trustee and Deutsche Bank National Trust Company, as trustee,* will restate the
 14 trust agreement and *will be the governing instrument of the Trust.*”) (emphasis added).
 15 “The permissible activities of the Trust[s]” can only be modified “by an amendment to the
 16 pooling agreement” between WMB and the trustees. *Id.*, at S-26. The Rating Agencies are
 17 not alleged to have been parties to any of these agreements.

18 Although Plaintiffs assert no claim against the Issuing Trusts, they summarily state
 19 in the SAC that “the Issuing Trusts, as the issuing trusts of the Certificates herein, are
 20 strictly liable for misstatements and omissions contained in the Offering Documents under
 21 Section 11” of the 1933 Act. (*Id.* ¶ 214). Plaintiffs further allege that the Individual
 22 Defendants, WCC and the Rating Agencies all “controlled” the Issuing Trusts and thus, are
 23 each liable under § 15 of the 1933 Act. (*Id.* ¶¶ 205, 206, 213).

24 **STANDARD OF REVIEW**

25 As recently confirmed by the United States Supreme Court, to survive a motion to
 26 dismiss, a plaintiff’s complaint may not rely merely on “labels and conclusions” but,

1 instead, must “contain sufficient factual matter, accepted as true, to ‘state a claim that is
 2 plausible on its face.’” *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (quoting *Bell*
 3 *Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)); *see also Swartz v. Deutsche Bank*,
 4 2008 WL 1968948, at *5 (W.D. Wash. May 2, 2008) (“[C]onclusory allegations and
 5 unwarranted inferences are insufficient to defeat a motion to dismiss.”) (citing *Twombly*).
 6 It is not enough to plead facts that are “‘merely consistent with’” liability. *Iqbal*, 129 S. Ct.
 7 at 1949 (quoting *Twombly*). A plaintiff must plead “factual content that allows the court to
 8 draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Id.*;
 9 *see also Lubic v. Fidelity National Financial, Inc.*, 2009 WL 2160777, at *2 (W.D. Wash.
 10 July 20, 2009) (same) (quoting *Iqbal* and *Twombly*).

11 ARGUMENT

12 I. PLAINTIFFS’ § 15 CLAIMS AGAINST THE RATING AGENCIES 13 SHOULD BE DISMISSED.

14 Section 15 of the 1933 Act provides that:

15 Every person who, by or through stock ownership, agency, or
 16 otherwise, or who, pursuant to or in connection with an
 17 agreement or understanding with one or more other persons
 18 by or through stock ownership, agency, or otherwise,
 19 controls any person liable under sections 11 or 12 of this
 title, shall also be liable jointly and severally with and to the
 same extent as such controlled person, . . . unless the
 controlling person had no knowledge of or reasonable ground
 to believe in the existence of the facts by reason of which the
 liability of the controlled person is alleged to exist.

20 15 U.S.C. § 77o. To state a claim for control person liability, Plaintiffs must allege that:
 21 (1) the alleged primary violators (here, the Issuing Trusts) violated §§ 11 or 12 of the 1933
 22 Act; and (2) the Rating Agencies exercised actual “control” over the Issuing Trusts within
 23 the meaning of § 15. *See, e.g., Fouad v. Isilon Systems, Inc.*, 2008 WL 5412397, at *11
 24 (W.D. Wash. Dec. 29, 2008 (citing *Howard v. Everex Systems, Inc.*, 228 F.3d 1057, 1065
 25 (9th Cir. 2000)) (dismissing allegations of control based on minority ownership that were
 26 unsubstantiated and conclusory). Plaintiffs’ § 15 claims against the Rating Agencies fail

on both points. First, the SAC contains absolutely no allegation that would support the inference that the Issuing Trusts have primary liability here under §§ 11 or 12. *See* Section I.A. Second, the SAC fails, in any event, to provide any plausible factual basis to support Plaintiffs' conclusory allegation that the Rating Agencies "controlled" the Issuing Trusts. *See* Section I.B.

A. Plaintiffs Do Not Assert A Primary Violation By The Issuing Trusts.

It is black letter law that a § 15 claim must fail if a plaintiff does not allege that the allegedly controlled entity actually committed a primary violation of the 1933 Act (*i.e.*, either a § 11 or § 12 violation). *See, e.g., Falkowski v. Imation Corp.*, 309 F.3d 1123, 1132 n.2 (9th Cir. 2002), *amended by* 320 F.3d 905 (9th Cir. 2003) (Section 15 does not set forth "separate grounds for liability"); *In re Washington Mutual, Inc. Securities, Derivative & ERISA Litigation*, 259 F.R.D. 490, 508-09 (W.D. Wash. May 15, 2009) ("To state a claim for control person liability, Plaintiffs must allege . . . a primary violation of the securities laws. . . ."); *Fouad*, 2008 WL 5412397, at *11; *Rubke v. Capitol Bancorp Ltd.*, 460 F. Supp. 2d 1124, 1151 (N.D. Cal. 2006) ("Adequate pleading of a primary violation is required for a plaintiff to adequately plead control person liability."). Here, Plaintiffs neither expressly assert §§ 11 or 12 claims against the Issuing Trusts, nor plead facts sufficient to support such claims even if they were made. This defect is fatal to Plaintiffs' § 15 claims against the Rating Agencies.

The few allegations in the SAC actually concerning the Issuing Trusts merely state that the Issuing Trusts held "the mortgage loans" that served as collateral for the Certificates, issued the Certificates, received the mortgage payments collected by WMB, and "periodically distributed payments to investors as specified by the terms of the Certificates." (SAC ¶¶ 7, 10, 23, 40, 216). These few allegations fall far short of demonstrating that the Issuing Trusts fall into any of the categories of persons subject to primary liability under §§ 11 or 12(a)(2) of the Act.

1 Section 11 liability is limited, on its face, to the following entities:

2 (1) every person who signed the registration statement; (2)
 3 every person who was a director . . . or partner in the issuer at
 4 the time of the filing . . . ; (3) every person who, with his
 5 consent, is named in the registration statement as being or
 6 about to become a director, person performing similar
 7 functions, or partner; (4) every accountant, engineer, or
 8 appraiser, or any person whose profession gives authority to
 9 a statement made by him, who has with his consent been
 named as having prepared or certified any part of the
 registration statement, or as having prepared or certified any
 report or valuation which is used in connection with the
 registration statement, with respect to the statement in such
 registration statement, report, or valuation, which purports to
 have been prepared or certified by him; [and] (5) every
 underwriter with respect to such security. 15 U.S.C. §77k(a).

10 Similarly, § 12 liability is limited to those entities that were direct sellers or solicitation
 11 sellers of the securities at issue. *See Pinter v. Dahl*, 486 U.S. 622, 642-43 (1988).

12 Here, the SAC contains no allegation that the Issuing Trusts sold the Certificates or
 13 performed any of the actions or roles that would trigger potential liability under §§ 11 or
 14 12. For example, the Plaintiffs do not and cannot allege that the Issuing Trusts signed the
 15 Registration Statements or acted as “experts” or “underwriters” under § 11(a)(1), (a)(4) or
 16 (a)(5). Further, the Issuing Trusts — which Plaintiffs themselves assert are mere “shell
 17 entities” that performed no meaningful role here (SAC ¶ 216) — were not the registrants of
 18 the Certificates at issue and, by SEC regulation, are not the “Issuers” of the Certificates as
 19 that term is defined in the federal securities laws. Regulation AB, adopted by the SEC in
 20 January 2005, makes clear that it is the “depositor” in an asset-backed securities transaction
 21 that is considered the “issuer” of the Certificates — not the issuing trusts. 17 C.F.R. §
 22 229.1100 (2005). *See also* Asset-Backed Securities, Release Nos. 33-8518, 34-50905, File
 23 No. S7-21-04 (Final Rule Dec. 22, 2004) (“[W]e are adopting our proposed specification
 24 that the depositor is the ‘issuer’ for purposes of Exchange Act reporting regarding asset-
 25 backed securities.”). Accordingly, the Depositor — WMAAC — registered the
 26 Certificates here and acted as the “Issuer” for purposes of the federal securities laws. *See*,

1 e.g., SAC ¶ 4 (alleging that WMAAC “prepared and filed the Registration Statements and
2 was the depositor of the underlying mortgage collateral into the Issuing Trusts”). There is
3 no allegation in the SAC — nor could there be — that the Rating Agencies “controlled”
4 WMAAC.

5 Similarly, Plaintiffs do not plead that the Issuing Trusts sold the Certificates to the
6 Plaintiffs to trigger potential liability under § 12(a)(2). Rather, it is WCC — an entity that
7 plaintiffs never allege the Rating Agencies controlled — that is alleged to have sold the
8 Certificates. *See, e.g.,* SAC ¶ 197 (“Defendant WCC . . . sold the Certificates pursuant to
9 the defective and misleading Prospectus Supplements for its own financial gain.”). *See*
10 *also New Jersey Carpenters Health Fund v. DLJ Mortgage Capital, Inc.*, No. 08 Civ. 5653
11 (S.D.N.Y. Mar. 29, 2010) (dismissing § 12 claim against Issuing Trust where plaintiffs had
12 not pled that they “purchased the Certificates directly from the Issuing Trust”).

13 In summary, Plaintiffs simply have not pled that the alleged controlled entities —
14 the Issuing Trusts — committed a primary violation under the 1933 Act. Accordingly, any
15 derivative claim for “controlling person” liability must be dismissed.

16 **B. The Rating Agencies Are Not “Controlling Persons.”**

17 Separate and apart from Plaintiffs’ failure to plead a primary violation by the
18 Issuing Trusts, their § 15 claims against the Rating Agencies also must fail because the
19 SAC does not (and cannot) allege that the Rating Agencies “controlled” anyone, let alone
20 the Issuing Trusts.

21 Control is “the power to direct or cause the direction of the management and
22 policies of a person, whether through the ownership of voting securities, by contract, or
23 otherwise.” 17 C.F.R. § 230.405 (standard adopted in *Safeway Portland Employees’*
24 *Federal Credit Union v. C.H. Wagner & Co.*, 501 F.2d 1120, 1124 n.17 (9th Cir. 1974)).
25 “The power to influence or persuade,” however, “is not control for purposes of Section 15
26 of the 1933 Act.” *In re Lehman Bros.*, 2010 WL 337997, at *5. “What is required is ‘the

1 practical ability to *direct* the actions of people who issue or sell securities.” *Id.* (emphasis
2 in original) (citation omitted).

3 Accordingly, in order to state a claim for control person liability, a plaintiff must set
4 forth facts that raise an inference that the defendant actually controlled the primary
5 violator’s day-to-day affairs. “[T]he defendant’s involvement in an isolated corporate
6 action” cannot be the basis for a control person claim; the control person inquiry
7 “revolve[s] around the ‘management and policies’ of the corporation, not around discrete
8 transactions.” *Paracor Finance, Inc. v. General Electric Capital Corp.*, 96 F.3d 1151,
9 1162 (9th Cir. 1996). Moreover, conclusory allegations of control are insufficient as a
10 matter of law. *See, e.g., Fouad*, 2008 WL 5412397, at *13 (dismissing claims against
11 venture capital firms because plaintiffs relied upon conclusory allegations for § 15
12 liability); *McCasland v. Formfactor Inc.*, 2008 WL 2951275, at *11 n.27 (N.D. Cal. July
13 25, 2008) (allegations that defendants had the “power and authority to control information
14 released to the public by virtue of their position” were insufficient to “plead specific facts
15 upon which a fact finder could reasonably conclude that the individual defendants violated
16 the federal securities laws”).

17 Here, Plaintiffs’ allegations regarding the Rating Agencies are entirely devoid of
18 any of the hallmarks generally considered adequate to plead “control.” *Cf. Fouad*, 2008
19 WL 5412397, at *12 (allegations of control found to be sufficient when defendant outside
20 directors were members of primary violator’s audit committee, which was responsible for
21 internal controls, independent auditors, and review of financial results, press releases and
22 code of ethics, “the very mechanisms intended to prevent the alleged fraud”); *In re*
23 *Washington Mutual*, 259 F.R.D. at 509 (allegations of control found to be sufficient where
24 defendants had signed offering documents, served on the board and participated in the
25 board’s audit committee and/or finance committee, especially where SEC filing stated that
26 entire board had been engaged in ““formulating and overseeing management’s

1 implementation of risk management policies”). Plaintiffs provide no factual basis to
2 assert that the Rating Agencies directed the day-to-day management or policies of the
3 Issuing Trusts.

4 Instead, Plaintiffs’ § 15 claims against the Rating Agencies rely exclusively on the
5 strained theory that because the Rating Agencies allegedly controlled and determined the
6 “structure and levels of credit support” necessary to support the assigned credit ratings,
7 they “controlled” the Issuing Trusts. *See, e.g.*, SAC ¶¶ 10, 43. They plead nothing more
8 than that the rating process may have persuaded persons who controlled the issuer to
9 structure the securities in a certain manner. To date, *every court* to consider this theory has
10 rejected it. Indeed, identical claims against the Rating Agencies under § 15 have been
11 dismissed as a matter of law in the four cases that have decided the issue. *See In re Wells*
12 *Fargo*, No. 09-cv-1376, slip op. at 12-14 (Abrams Decl., Ex. B); *In re Lehman Bros.*, 2010
13 WL 337997, at *4-*5; *In re IndyMac*, No. 09-cv-04583, slip op. at 1 (Abrams Decl., Ex.
14 C); *Royal Bank of Scotland*, 2010 WL 1172694, at *7.

15 Most recently, on April 22, 2010, a federal court in California dismissed on a
16 motion to dismiss virtually identical § 15 claims with prejudice. *In re Wells Fargo*, slip op.
17 at 12-14 (Abrams Decl., Ex. B). The court specifically considered the plaintiffs’ allegation
18 — like the allegation pled here — that “the Rating Agencies were able to influence certain
19 portions of the transactions at issue.” *Id.* at 13. But this, the court found, was “insufficient
20 to plead a control person theory” because plaintiffs did not plead that the Rating Agencies
21 “had any sort of general ‘power to direct or cause the direction of the management and
22 policies’ of the originators and underwriters — the primary parties to the creation and
23 issuance of the Certificates.” *Id.* (citing *Paracor*, 96 F.3d at 1162; *In re Stratosphere*
24 *Corp. Securities Litigation*, 1 F. Supp. 2d 1096, 1122 (D. Nev. 1998) (“Plaintiffs have
25 merely alleged that ‘but for’ the Underwriters’ participation, the Stock Offering could not
26 have been accomplished. This type of proximate causation is not a sufficient basis for

1 ‘control person’ liability, which requires the exercise of actual power or influence over a
2 company.”)⁵

3 The same compelling reasoning was set forth in *In re Lehman Bros.*, where another
4 court unequivocally rejected similar § 15 claims against the Rating Agencies. The *Lehman*
5 court held that the complaint there, like the SAC here:

6 fairly read, alleges only that the Rating Agencies had the
7 power to influence [the alleged primary violators, including
8 the issuing trusts] with respect to the composition of the
9 pools of mortgages to be securitized and the credit
10 enhancements the Rating Agencies regarded as necessary to
11 obtain the desired ratings. *But those allegations fall
12 considerably short of anything that could justify a
13 reasonable trier of fact in concluding that the decision
14 making power lay entirely with the Rating Agencies.*

15 *Lehman*, 2010 WL 337997, at *5 (emphasis added). See also *New Jersey Carpenters*
16 *Health Fund v. Residential Capital, LLC*, 2010 WL 1257528, at *7 (S.D.N.Y. Mar. 31,
17 2010) (dismissing § 15 claims and holding that allegations were insufficient to plead that
18 “distinct, nonsubsidiary banks” that acted as underwriters were “control persons” of the
19 “companies that securitized and issued” the securities at issue). Plaintiffs’ § 15 claims
20 against the Rating Agencies here similarly should be dismissed.⁶

21 Moreover, Plaintiffs’ conclusory allegations of “control” are directly refuted by
22 other allegations of the SAC, as well as the Offering Documents on which Plaintiffs base
23 their claims. For example, as noted above, pursuant to the Offering Documents, the Rating
24 Agencies were parties to neither the agreements that created the trusts nor to the

25 ⁵ The court further held that “plaintiffs’ control person theory of liability overlaps substantially
26 with the theory by which plaintiffs seek to hold the Rating Agency Defendants directly liable
under Section 11” — a theory that the court in *In re Wells Fargo* also rejected. *In re Wells Fargo*,
slip op. at 13. See also *supra* n.2 and accompanying text.

⁶ Indeed, accepting Plaintiffs’ theory here would expand the 1933 Act beyond recognition. Their
theory necessarily would convert all lawyers, accountants and other third-parties that advise
issuers and underwriters into “controlling persons” of the entities that follow that advice.
Plaintiffs provide no legal authority for such an expansion of the 1933 Act and, indeed, there is
none. See *Swartz*, 2008 WL 1968948, at *19-*20 (an assertion that an employee provided
economic and investment advice “is not an allegation of control”).

1 “governing instrument[s]” for the trusts. *See supra* pp. 4-5. In fact, the agreements setting
2 forth the “permissible activities” of the Issuing Trusts are agreements solely between the
3 trustee and WMAAC and/or WMB. Indeed, WMB and WMAAC are the entities that the
4 SAC asserts effectively controlled every aspect of the creation and issuance of the
5 Certificates, from “acquir[ing] the underlying mortgage loan collateral” to “deposit[ing] the
6 mortgage loans in each of the Issuing Trusts” to “fil[ing] the common Registration
7 Statements” and selling the Certificates. *See, e.g.*, SAC ¶¶ 2, 10, 23, 24, 35, 37, 89, 90,
8 184, 197. In their prior complaints, the Plaintiffs even said so in so many words. *See*
9 Amended Consolidated Class Action Complaint (Dec. 31, 2009) ¶ 7 (“WaMu controlled
10 almost every aspect of the creation and issuance of the Certificates — from origination and
11 pooling of the underlying mortgage loans, through the securitization of the loans and the
12 sale of the Certificates representing interests in the loans to Plaintiffs and the Class.”).
13 Plaintiffs have since dropped this sentence from the SAC.

14 Plaintiffs’ “control” theory is also contradicted throughout the SAC by Plaintiffs’
15 repeated allegations that the Wamu Defendants controlled the ratings assigned to the
16 Certificates through an alleged “ratings shopping” process. For example, the SAC alleges
17 that: “[i]n order to ensure that a substantial portion of the Certificates were awarded the
18 AAA ratings, WaMu had the Rating Agencies *compete* for the engagement by including
19 their proposed ratings as part of their bid for the Certificate ratings engagement.” (SAC ¶
20 91) (emphasis added). *See also* SAC ¶ 115 (“In order to obtain the highest ratings for each
21 Certificate, WaMu *leveraged* the ‘Big Three’ credit rating agencies (Moody’s, S&P and
22 Fitch) off one another and shopped around until it found the best ratings.”) (emphasis
23 added); ¶ 117 (“WaMu would then again ‘*negotiate*’ with S&P before the engagement was
24 finalized, in order to decrease the amount of loss coverage and credit enhancement S&P’s
25 model required for the specific deal, while still maintaining the highest percentage of
26 AAA-rated Certificates.”) (emphasis added). *See also* SAC ¶ 94 (“Rating Agencies may be

1 *pressured* by arrangers to produce a more favorable outcome or reduce credit enhancement
 2 levels, thus reducing the cost of the debt for a given level of cash inflows from the asset
 3 pool.”) (emphasis added and other emphasis omitted).

4 For each of these reasons, Plaintiffs simply have not pled that the Rating Agencies
 5 “controlled” the Issuing Trusts — or any other entity — and their § 15 claims against the
 6 Rating Agencies should accordingly be dismissed.

7 **II. PLAINTIFFS’ § 15 CLAIMS AGAINST THE RATING AGENCIES**
 8 **ARE TIME-BARRED.**

9 Plaintiffs’ § 15 claims against the Rating Agencies should also be dismissed for the
 10 independent reason that they are time-barred. Section 13 of the 1933 Act provides as
 11 follows:

12 No action shall be maintained . . . under [11 or 12(a)(2)]
 13 unless brought within one year after the discovery of the
 14 untrue statement or the omission, or after such discovery
 15 should have been made by the exercise of reasonable
 16 diligence In no event shall any such action be brought to
 17 enforce a liability created under [11] more than three years
 18 after the security was bona fide offered to the public, or
 19 under [12(a)(2)] of this title more than three years after the
 20 sale. 15 U.S.C. §77m.⁷

21 Here, to the extent Plaintiffs’ § 15 claims are based on offerings preceding November 23,
 22 2006 — *i.e.*, three years before filing their claims against the Rating Agencies — they are
 23 absolutely barred by the three-year statute of repose. In addition, with respect to *all* of the
 24 offerings at issue, Plaintiffs knew or should have known the material facts on which they
 25 base their § 15 claims against the Rating Agencies more than one year prior to filing their
 26

27 ⁷ The limitations periods set forth in Section 13 are equally applicable to Section 15 claims
 28 because they are merely derivative of Section 11 or 12(a)(2) claims. *See Malone v. Clark Nuber*,
 29 2008 WL 2545069, at *5) (W.D. Wash. June 23, 2008), *reconsideration granted in part on other*
 30 *grounds in* 2008 WL 4279502 (W.D. Wash. Sept. 12, 2008) (“Since Section 15 merely creates a
 31 derivative liability for violations of Sections 11 and 12, Section 13 applies to it as well”) (quoting
 32 *Dodds v. Cigna Securities, Inc.*, 12 F.3d 346, 349 n. 1 (2d Cir. 1993)).

1 claims on November 23, 2009.⁸ For this reason as well, they are barred by the one-year
2 statute of limitations.

3 **A. Plaintiffs' § 15 Claims Against the Rating Agencies Based on 17 of the**
4 **36 Offerings Are Time-Barred by the Three-Year Statute of Repose.**

5 The SAC lists the "Approximate Offering Date" for each of the offerings at issue.
6 (SAC ¶ 38). Seventeen of these have offering dates prior to November 23, 2006.
7 Accordingly, Plaintiffs' § 15 claims against the Rating Agencies with respect to these
8 securities are barred by the three-year statute of repose. Of the remaining 19 offerings,
9 Plaintiffs have alleged that they purchased from only 5. (SAC ¶¶ 20-22).

10 **B. Plaintiffs' § 15 Claims Against the Rating Agencies Are Time-Barred**
11 **by the One-Year Statute of Limitations.**

12 Plaintiffs' remaining § 15 claims against the Rating Agencies are also time-barred
13 under the applicable statute of limitations. As the courts of this and other Circuits have
14 consistently observed, a plaintiff may be found to be on inquiry notice as a matter of law —
15 and therefore time-barred — on a motion to dismiss. *See, e.g., In re Stac Electronics*
16 *Securities Litigation*, 89 F.3d 1399, 1411 (9th Cir. 1996); *In re Network Commerce Inc.*
17 *Securities Litigation*, 2006 WL 1375049, at *3 (W.D. Wash. May 16, 2006), *affirmed in*
18 *part and reversed in part on other grounds by Sherman v. Network Commerce Inc.*, 346
19 Fed. App'x. 211 (9th Cir. Sept. 22, 2009).

20 ⁸ Plaintiffs' claims against the Rating Agencies do not relate back to the filing of their initial
21 complaint. Under Fed. R. Civ. P. 15(c)(1)(C)(ii), claims against a new defendant do not relate
22 back unless the plaintiff can establish that the defendant was omitted from the original complaint
23 due to a "mistake concerning the proper party's identity." Here, where the Rating Agencies' ratings
24 were a part of the Registration Statements — and their identities thus known — Plaintiffs
cannot possibly contend that the Rating Agencies were omitted from the original complaints
because of a "mistake" as to their identity. *See, e.g., Louisiana-Pacific Corp v. ASARCO, Inc.*, 5
F.3d 431, 434 (9th Cir. 1993) (Rule 15(c) relation-back doctrine inapplicable where "[t]here was
no mistake of identity, but rather a conscious choice of whom to sue").

25 In any event, as explained in the WaMu Defendants' brief, which the Rating Agencies join,
26 Plaintiffs' claims were already time-barred in August 2008 when Plaintiffs filed their initial
complaint.

1 The one-year period begins to run when the plaintiff receives either actual or
2 inquiry notice of a potential violation. *See, e.g., In re Stac Electronics Securities*
3 *Litigation*, 89 F.3d 1399, 1411 (9th Cir. 1996); *In re Network Commerce Inc. Securities*
4 *Litigation*, 2006 WL 1375049, at *3 (W.D. Wash. May 16, 2006). The Ninth Circuit
5 applies an “inquiry-notice-plus-reasonable-diligence test” to determine whether a statute of
6 limitations begins running due to inquiry notice. In other words, if the court determines
7 that a plaintiff was on “inquiry notice” by the relevant date, the claim will be time-barred
8 so long as the court also determines that the plaintiff, “in the exercise of reasonable
9 diligence, should have discovered the facts” allegedly supporting the complaint. *Id.*
10 (citation and internal quotation marks omitted). Where, as here, publicly available
11 information has indisputably put a plaintiff on notice of those facts on or before the inquiry
12 notice date, “the inquiry notice and reasonable diligence tests merge because of the level of
13 detail that was disclosed.” *Kreek v. Wells Fargo & Co.*, 652 F. Supp. 2d 1053, 1060 (N.D.
14 Cal. 2009) (public information “not only put plaintiffs on notice,” it also “exposed” facts
15 needed to file the action, thus triggering the statute of limitations); *see also In re Novagold*
16 *Resources Inc. Securities Litigation*, 629 F. Supp. 2d 272, 288 (S.D.N.Y. 2009) (plaintiff
17 that chooses to assert non-fraud securities claim is “on inquiry notice when it learns of the
18 probability of an earlier ‘untrue statement’ or ‘omission,’ not when it learns a misstatement
19 involved fraud”).

20 Inquiry notice may be triggered by “any financial, legal, or other data, such as
21 public disclosures in the media about the financial condition of the corporation and other
22 lawsuits . . . that provide the plaintiff with sufficient storm warnings to alert a reasonable
23 person to the probability that there were either misleading statements or significant
24 omissions involved in the sale of securities.” *In re Infonet Services Corp. Securities*
25 *Litigation*, 310 F. Supp. 2d 1106, 1113-14 (C.D. Cal. 2003) (citation and internal quotation
26 marks omitted). The Court “can impute knowledge of public information without

1 inquiring into when, or whether, individual shareholders actually knew of the information
2 in question.” *Berry v. Valence Technology, Inc.*, 175 F.3d 699, 703 n.4 (9th Cir. 1999).
3 With respect to publicly available information such as press releases and news articles,
4 where there is a “reasonable nexus between the allegations made in the article[s] and the
5 nature of the action subsequently brought,” such “article[s] . . . put shareholders on inquiry
6 notice.” *Id.* at 705.

7 Here, where Plaintiffs’ first complaint was filed over a year before they sued the
8 Rating Agencies, and where the SAC exclusively relies on *pre-November 2008 disclosures*
9 to support Plaintiffs’ allegations, there can be no dispute that Plaintiffs were on inquiry
10 notice of the facts supporting their claims long before November 23, 2008. For example,
11 Plaintiffs effectively concede that, *at the very latest*, they were on inquiry notice (and
12 more) of their claims in July 2008 after the release of a report by the SEC (the “July 2008
13 SEC Report”). (SAC ¶ 92 (“The July 2008 SEC Report confirmed significant undisclosed
14 conflicts of interest which gave the Rating Agencies an incentive to issue inflated ratings.
15 The July 2008 SEC Report found, in violation of SEC Rules, that ‘key participants’ in the
16 securitization process negotiated fees the Rating Agency would receive in exchange for its
17 high ratings.”) (citation omitted)). According to the SAC, the July 2008 SEC Report
18 provided the essential information for Plaintiffs’ claims relating to the Rating Agencies’
19 alleged use of outdated models, their alleged role in structuring the offerings, the alleged
20 “ratings shopping” practice, and alleged conflicts of interest. (SAC ¶¶ 92-94). *See also*
21 SAC ¶¶ 95-96, 108-09, 122 (quoting and relying on press reports in April, June and
22 October 2008). Indeed, the same counsel for Plaintiffs in this case actually brought claims
23 against the Rating Agencies under the 1933 Act based on similar allegations well before
24 November 23, 2008. *See New Jersey Carpenters Vacation Fund v. Harborview Mortgage*
25 *Loan Trust*, No. 08-cv-5093 (HB) (complaint filed May 14, 2008).
26

Putting aside the merits, if any, of these pre-November 23, 2008 public reports, each of these events as reported in the SAC put Plaintiffs on inquiry notice of their claims. As such, these claims are now time-barred and should be dismissed.

CONCLUSION

Plaintiffs' § 15 claims against the Rating Agencies should be dismissed.

DATED this 27th day of April, 2010.

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